UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GREGORY MARONEY,

Plaintiff,

7:20-CV-02788 (CS)(JCM)

-vs-

TELECONFERENCE

KSF ACQUISITION CORPORATION,

Defendants.
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Proceedings recorded via digital recording device

United States Courthouse
White Plains, New York

Thursday, March 3, 2022

B e f o r e:

HONORABLE JUDITH C. McCARTHY
Magistrate Judge

A P P E A R A N C E S:

BURSOR & FISHER, P.A.
Attorneys for Plaintiffs
BY: ANDREW OBERGFELL, ESQ.,

GREENBERG TRAURIG, LLP
Attorneys for Defendant
BY: RICK L. SHACKLEFORD, ESQ.
PHILIP H. COHEN, ESQ.
ANDREA N. CHIDYLLO, ESQ.,

THE DEPUTY CLERK: This is the matter of Gregory Maroney versus KSF Acquisition Corporation.

Counsel, state your appearances for the record.

MR. OBERGFELL: Good morning, your Honor. This is Andrew Obergfell for the Plaintiff, Gregory Maroney.

THE COURT: Good morning.

MR. SHACKLEFORD: Good morning, your Honor. Rick Shackleford with Greenberg Traurig for Defendant KSF Acquisition Corp.

MR. COHEN: Good morning, your Honor. Philip Cohen, Greenberg Traurig, for KSF Acquisition Corp.

MS. CHIDYLLO: Good morning. Andrea Chidyllo, Greenberg Traurig, for Defendant KSF Acquisition Corp.

THE COURT: Good morning, Counsel.

So we had a conference on -- just a little while ago, about a month, on February 3rd, and I have received -- there were some issues that were -- that you brought up then and I've received letters, Docket 50 and 51, which I have reviewed. I know there were two issues raised in Docket 51. One was an attorney/client privilege. I understand that is no longer an issue for the Court, but the e-discovery, scope and completion, remains an issue.

Is that correct?

MR. OBERGFELL: Yes, your Honor.

MR. SHACKLEFORD: Yes, your Honor.

THE COURT: Okay. Before we go into that, can you tell me also what has happened since we last spoke.

MR. OBERGFELL: Your Honor, this is Andrew Obergfell for the Plaintiff.

As your Honor would recall, after the last conference, Defendant was to provide hit counts for our revised search terms, which we had provided shortly before the last conference. We received that hit report on February 17th, so two weeks after the conference before your Honor. As soon as we received that new hit report from Defendant, you know, we provided a proposal to limit the overall number of hits and strings, and we provided that proposal, I think, either the same day or the day after and we have one string that's still in dispute which we're talking about today, and, as I understand it, Defendant is in the process of reviewing documents associated with those strings, or at least will be in the near future.

There was also a challenge to the privilege -- some of the privilege designations as your Honor referenced, and I think those documents were produced last night by Defendant, but, you know, the main issue is, you know, completing this document production. You know, we haven't seen the, you know, the documents associated with, you know, the search term hits at issue, so I think that's, that's the main issue right now.

THE COURT: Okay. So let me hear arguments on -- and I believe that the only issue is the search terms as it relates

to line 6? Or row 6?

MR. OBERGFELL: Yes, your Honor, that's MCT oil and coconut oil linked with label or labeling?

THE COURT: Yep. And this hit list has that at getting 7,504 hits.

MR. OBERGFELL: That's correct, your Honor.

THE COURT: Okay. So I want to hear arguments on why...each side's position.

MR. OBERGFELL: Yes, your Honor, and, again, this is Andrew Obergfell for the Plaintiff.

So basically, your Honor, when we're dealing with, you know, production of ESI, you know, it's black letter law, you know, in this district that -- it's a two-step inquiry, one, is there good cause, you know, for the production of the requested discovery and is there a commensurate burden counterbalancing that, you know, that inquiry, the good-cause inquiry.

On the question of good cause, you know, the very heart of this case, your Honor, is about the label of the product and specifically the ingredient MCT oil, otherwise known as coconut oil, and whether the label claims associated with that ingredient are substantiated, namely does the MCT oil result in weight loss, does -- is it clinically proven, and so these search terms were targeted to understand the communication surrounding the labeling of the product, and also relevant to that is that, you know, there's an fraud claim, there's GBL

claims in this case, and Defendant's knowledge of the efficacy of the MCT oil and knowledge of whether or not the labeling was false or deceptive is directly at issue in this case, and that's why we provided that search term, to link up the challenged ingredient with the actual labeling of the product.

Now, Defendant says, "well, MCT oil is an ingredient in a number of our products," and that much is true. However, Defendant sought to limit the string by, you know, including the term 'caprylic,' and caprylic acid is essentially a component on of MCT oil. However, we think that that would too...much -- would narrow the scope of the search so much that potentially very relevant information would be omitted.

For example, one could imagine an e-mail string where, you know, two employees are discussing and saying, you know, MCT oil doesn't really result in weight loss and maybe we shouldn't put it on the label. That communication would be captured by our proposed search term, it would not be captured by Defendant unless they used the term 'caprylic,' which is a fringe term that's unlikely to be used probably in modern -- you know, in common discourse between employees.

So we think given the, the low number of overall hits compared to the fact that this is a nationwide class action and that the fact that this string seems to look at exactly what's at issue in this case, namely the labeling and the MCT oil and coconut oil ingredients specifically, that we think that our

string should be searched and relevant documents associated with that string should be produced because, you know, it strikes right at the heart of the case.

And weighed against that is Defendant has not identified any specific burden in actually reviewing the documents associated with this string and producing what's relevant, and it's clear in this district, you know, based on case law that a claim of undue burden has to be substantiated by evidence, by affidavits, things of that nature, which Defendant could have provided to this Court, but they didn't, so we have what we think is a very relevant string and a proposed limitation by Defendant that would leave out highly -- potentially highly relevant information, and, you know, weighed against no real proposed burden by Defendant, we think that that string, you know, should be searched.

And I'd also note that, you know, we've met and conferred and we provided what we think is a pretty reasonable limitation on what was the overall number of hits based on our terms and we're really just trying to get to the brass tacks of what's relevant in this case.

THE COURT: Do we know what the hit would be if we added the word 'caprylic'?

MR. OBERGFELL: I do not know that information, your Honor. Perhaps Defendant does, though.

THE COURT: Okay.

Who wants to speak on behalf of Defendant?

MR. SHACKLEFORD: This is Rick Shackleford, your Honor. I'll take the main mode, but the question that the Court asked directly, Ms. Chidyllo may know the answer to that question, so I would defer to her on that before I weighed in.

MS. CHIDYLLO: Hi. I do not -- this is Ms. Chidyllo. I do not know the answer, but I'm going to see if I can figure it out as we're speaking here.

THE COURT: Okay. Mr. Shackleford, you can continue.

MR. SHACKLEFORD: Yes, thank you, Your Honor, and I'd like to begin by complimenting Counsel.

I think the meet-and-confer efforts in this case have been productive, we had a conversation yesterday, so I think we're moving things along and I, I hope the Court appreciates that we are continuing to try to narrow the issues, so we've resolved the privilege issue, we've dealt with some other stuff and trying to minimize, you know, the time that we have to take up on your Honor's calendar. There are a couple things, though, that were said that I would push back on, because I think it's important to frame what the case is really about.

The case is about coconut oil as a standalone product, and I think it's -- you can understand why we're having the problem with this limitation if you just substitute the word 'butter' for 'coconut oil.' If I sold the product claiming butter as a standalone is an effective dietary supplement and

you should just take butter and eat butter as a standalone and you'll lose weight and I get sued over that and I'm hit with discovery asking for every product in an entire line of products that uses butter as an ingredient, you get a sense of why it is that we're having the problem we're having.

The case is about a unique dietary supplement, MCT oil, and we've proposed a limiter, and there's no dispute that the limiter would be unique to sorting out documents and communications limited to the only product that's at issue, but what Plaintiff wants to do is sweep in everything that uses coconut oil as an ingredient. It's a fat in food product, it's used in lots of different things, and whether as a fat in a meal replacement bar or some other product and whether that different product may be effective for weight loss by using that fat as opposed to a different fat is completely unrelated to the claim here that's applied to the single standalone product that has one ingredient, so that's why we proposed the limiter that we did.

And so regardless of -- you know, is the burden insurmountable? I think the case law supports the notion that you compare the burden with what is the value of the discovery that's at issue. That lies at the heart of proportionality, what is the relative need versus the relative burden, so whether the burden is enormous in the abstract as a standalone proposition is different in a comparison between the burden and

the de minimus value. This feels like discovery for the sake of discovery.

I would ask what fact in issue is going to be made more likely to be demonstrated by information pertaining to thirty other products, and I believe that is the count, thirty other products, that use coconut oil as an ingredient, and it has to be listed on the label if it's used as an ingredient whether there's any claim made about the coconut oil or not, so that's why we proposed the limiter that we did. We think it makes imminent sense in the circumstances, it is appropriately tailored to the facts at issue in the case and weeds out things that aren't at issue and can't possibly be at issue.

So that's why we have developed the limiter that we have, and we believe -- and we're happy to run the search, review the documents, produce whatever's responsive, but that's why we're here, that's the one thing as of today that we haven't been able to resolve.

THE COURT: So tell me, how do you address the fraud issue that Plaintiff is saying, that it goes to, you know, what the knowledge that Defendants had?

MR. SHACKLEFORD: Well, there's no claim made on the other products that the use of coconut oil is what makes the difference in a snack bar or a meal replacement or some other product. That's where we address the issue, so there would be no fraud claim. It's just not relevant to that. The issue is

whether this dietary supplement as a standalone is, you know, clinically proven to promote weight loss. That's his theory. Not that I've used the entire keto diet and you've used coconut oil as a key component of it. It's just one product.

So, again, I go back to butter. I may or may not believe butter as a standalone is great, but there's lots and lots of other reasons why one would use butter as an ingredient, as a fat, in a completely different product.

MR. COHEN: Your Honor, it's Philip Cohen.

Just to add to Mr. Shackleford's point, we do have an unlimited search with respect to 'clinically proven' and 'oil' and 'MCT oil' and 'coconut oil.' We're running that search, we're doing that search. The only one that we're looking for the limitation on is the search that includes the label, so if there's anything that relates to clinically proven and this product, it will be captured.

THE COURT: Mr. Obergfell.

MR. OBERGFELL: Yes, your Honor, I'd like to just address a few points there.

The first is that in terms of the proposed limiter, it's incorrect to say that the term 'caprylic' only appears on this specific product because caprylic acid is a component of MCT oil and it's, at least as far as the SlimFast company is concerned, considered to be a beneficial ingredient. It does appear on at least on one other product and that's the

ready-to-drink shakes, so that it's just the fact of the matter that it is true that there is going to be -- you know, this ingredient is, is across different product lines. However, this particular product is literally called MCT oil, so it's difficult to pinpoint this product in a more specific way.

And, your Honor, the bottom line is, I provided a hypothetical in my original presentation and that is that, for example, if there is an e-mail correspondence that says "MCT oil does not contribute to weight loss and, therefore, we can't put it on the label," just imagine that was in an e-mail, that would be directly relevant to our claims regarding the -- tying the MCT oil to purported weight loss, which is exactly what the challenge label is, clinically proven to lose weight and keep it off. So I appreciate that Defense Counsel has searched the clinically proven aspect of it, that is one aspect of it, but another aspect of it is the weight-loss aspect, and if you read Judge Seibel's decision on the MTD, you know, she found it to be plausible that, you know, a reasonable consumer could believe that consuming the MCT oil could lead to weight loss and maintain weight loss, so we're entitled to take discovery on that issue.

Now, I'm sympathetic to the fact that there could be some overlap with other products, but I can't have a situation where evidence like that, communications like that, are left out of the production because of an artificial limiter of the term

'caprylic' which may or may not appear, so the essence of the dispute is that I can't live with the fact that that kind of evidence may be left out of the search for the benefit of a marginally lower hit count.

THE COURT: Mr. Shackleford?

MR. SHACKLEFORD: It is utterly conjectural and speculative. We can invent all sorts of hypothetical scenarios of what might happen or what might be there and we can do it until we're blue in the face. The reality remains that it's a one-sided burden and it's a one-sided expense to chase down these, you know, rainbow unicorns.

Again, I come back to the point that this is about not coconut oil, not MCT oil. If this were a case about MCT oil, they would have pled it differently and they would have implicated other products. This is a case about a single product and whether this single product used all by itself is clinically support -- clinically proven to support weight loss. That's the theory. Plaintiff is the master of his own theory, that's what he pled, but once you do that, there are implications that are going to confine the four corners of discovery, so living within the four corners of the complaint, you're suing over this specific product, let's limit the discovery to this specific product. That's the point of the limitation that we've suggested.

And what you've just heard is that there might be all

other kinds of things talking about all kinds of other products out there with different ingredients, different functions, different uses, that aren't at issue in the case. He's chosen his theory; let's conduct discovery consistent with the four corners of the complaint.

THE COURT: And, Ms. Chidyllo, did you find out what the hit -- how the hit would change?

MS. CHIDYLLO: I do not believe we have that row with caprylic and what that row's change would be now. We'd have to get that information.

THE COURT: So I am going to...let me just look at your letter for a second.

(Brief pause)

THE COURT: I'm going to deny Plaintiff's request and allow Defendants to add the term 'caprylic' to it without prejudice to come back if you should find things in what has been produced in all of the production that would lead you to believe that there was something that might be missing that you need.

This isn't the only form of discovery in this case. You're going to be able to ask, you know, to witnesses what they understood and, you know, what they understood about the MCT oil and it as a standalone product. You are looking at one product here, not the oil in all products, not the labeling in all products. It's just in this one product.

I do believe when you're looking at proportionality, it's not just did it have good cause and is it a burden, it's really you're supposed to be weighing it on kind of the relevance, needs of the case, and whether it's proportional to, to both the need and the burden it'll have on. I don't believe -- you know, you're getting a lot of documents. You're going to get a lot of documents you're going to be reviewing. I don't think that narrowing this is going to limit you from getting something that you need in this case.

As I said, if you find that something in the other production reinforces your need to change it or something in this production, it goes down too dramatically, you know, forces your need to change it, then we can discuss it, it's without prejudice for you to come back, but I don't see -- I believe you're getting what you need to determining the facts of this case, what the Defendants knew, and you'll have an opportunity, also, to depose people to find out what they knew, what they believed, when they were involved in the labeling, and what they were writing on the label.

So I must ask you, how are you doing for production, you know, discovery? You have fact depositions April 29th. When do you think we're going to get past this...document discovery?

MR. OBERGFELL: Your Honor, I'd have to defer to Defendant on that because they're currently running the searches

right now, but I agree timing is an issue.

THE COURT: Counsel for Defendants, who wants to address this?

MR. SHACKLEFORD: I'll start, your Honor. We continue to work diligently on it. As we explained in our letter brief last week, it is a small in-house legal department and obviously they have other cases and other demands on their time. I spoke with Mr. Obergfell yesterday, we are certainly amenable, and if it's necessary and happy to do it today, to modify the scheduling order.

We really have two currencies that you deal with in completing discovery, time and money, and if there's no prejudice and we're mindful of the Court's schedule and the burden it creates by moving things around, but if extra time is necessary and reasonable time, you know, we talked about a notion of 60 days to make sure that the documents are reviewed, produced, and the Plaintiff has enough time to, you know, review them, simulate them, decide the questions to ask of witnesses and be able to do that in an orderly fashion.

The other currency's money. If you do that to meet a deadline, then it increases the cost and the burden of trying to get it within the deadline, and not to suggest that time is cheaper than money, but sometimes in the circumstances, that's a reasonable accommodation to make, but we are proceeding a pace.

THE COURT: So you don't know when it's going to be

produced.

MR. SHACKLEFORD: Since I don't have them in my hands personally, I can't tell you.

THE COURT: Can you tell me what schedule they're working on, what kind of resources they're committing to it, whether it's a priority or not a priority...

MR. SHACKLEFORD: It's absolutely a priority, and we are on the phone several times a week with our counterparts in the in-house legal department. Their IT department is located in Ireland, so we deal with some lengthy time zone differences, as well as getting information and the review of the documents, but that's -- you know, it's ongoing. It hasn't been set aside in deference to other things, but by the same token, it's not the only thing on the legal department's plate.

THE COURT: I'm disinclined to give you any extension of time right now. 4/29 is 60 days from now. If I give you another 60 days, I'm giving you 120 days to do this and you have no idea whether you're going to need that or not, and my experience is if you get it, you use it, and so you're not getting it.

I want you to continue working on this at pace, we're going to talk in 30 days, and you are going to give me a report. I would expect by that point -- and I would expect that there would be rolling production and that you don't wait until everything is reviewed, which, you know, I would expect there's

rolling production from the client to you and from you to the Plaintiff. There's no need to, you know, hold up -- yes, of course, you know, if you've only looked at a hundred documents, there's no need to do tranches of a hundred, but you shouldn't hold up until everything's done, so...you are likely to need more time, but you really don't know what you need at this point and I want to keep a little bit of pressure on you.

I appreciate the fact that the team is, you know...diligently working as you described it. I don't want that to change, and I want them to know that you have to report to me in four weeks that, you know, where's everything at, how much has been produced, and my hope is that I do not hear "nothing" and that I hear "everything" or "almost everything" at that time. Four weeks should be enough time to -- you know, if you're really diligently working on it.

I know people have other jobs, other responsibilities, not other jobs, but other responsibilities, but if time is spent every day on it, they can get through the documents.

MR. SHACKLEFORD: I appreciate that, your Honor. That will be the report out, that we remain under the, the current schedule and need to be working diligently to meet that, and I fully expect next time we talk to you that if it's not completed, I will be able to give you a date certain by when it will.

THE COURT: Yeah, and when I have that, I can have a

better sense of what you need and Mr. Obergfell can have a better sense of what he needs and can tell the Court, "yeah, I need X because I'm going to do X many depositions" and "I've just got the documents" or "I've only reviewed half of them," et cetera, so let's talk in a month from now.

Ms. Hummel, I think a month from now I have (inaudible) conference, so let's talk the week after that.

THE DEPUTY CLERK: So you're available on the 11th at eleven.

THE COURT: April 11th at eleven a.m.? Does that work for everyone?

MR. OBERGFELL: That should be work for Plaintiff, your Honor.

MR. SHACKLEFORD: Again, your Honor, we'll get it covered. We've got three of us, so somebody will be able to talk to you on the 11th.

THE COURT: Okay, so we will talk on April 11th at eleven a.m.

Thank you, everyone.

MR. OBERGFELL: Thanks, your Honor.

MR. SHACKLEFORD: Thanks, your Honor.

THE COURT: Be well.

MS. CHIDYLLO: Thank you.

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